SALUDIN SURIF

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUK MALEK AHMAD JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: B-05-25 OF 1994]
14 APRIL 1997

CRIMINAL PROCEDURE: *Conviction - Whether properly convicted - Proof beyond reasonable doubt - Exclusive possession - Prosecution's evidence pointing to accused having no exclusive possession of drugs - Invocation of s. 37(d) Dangerous Drugs Act 1952 - Whether a misdirection - Calling of defence - Whether also a misdirection - Dangerous Drugs Act 1952, s. 39B(1)(a)*

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in ganja - Exclusive possession - Drugs found in unlocked room accessible to accused and others - Whether drugs in exclusive possession of accused - Invocation of s. 37(d) of Act - Whether a misdirection - Whether accused ought to be acquitted and discharged*

EVIDENCE: *Admissibility - Charge of trafficking ganja - Evidence of accused supplying ganja to a witness prior to arrest - Whether inadmissible - Admission of evidence thereof - Whether prejudicial to accused*

The appellant was the chief tenant of the upper floor of the premises known as no. 14A, Jalan Kapas, Pelabuhan Kelang. The premises, which had five rooms, were occupied by five people including the appellant. The facts showed that, of the five rooms, one ('room B3') was not occupied by anyone in particular and was being used by the people living in the premises, *inter alia* as repository for their old clothes. Room B3 was never locked, and was accessible not only to all the five tenants but also to anyone who visited the premises.

On 23 May 1990, the police raided the premises and found from room B3 1248.02 grams of ganja, following which the appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952, ('the Act') for trafficking in the said drug. Before the learned Judge, evidence was adduced that SP 12 had prior to the raid smoked ganja in the premises, and that the said ganja was provided by the appellant. This evidence was not challenged by the appellant,

and on that ground was admitted by the Court. On the facts, the learned Judge also thought it justified to invoke s. 37(d) of the Act, and having done that, convicted the appellant and sentenced him to death. The appellant appealed wherefore the following questions arose for the determination of the Court of Appeal:

(i) whether the conviction was vitiated by misdirection, in that the learned trial Judge, on the facts, ought to have acquitted and discharged the appellant; and

(ii) whether the learned Judge was wrong in admitting into evidence SP12's testimony that he had smoked ganja supplied by the appellant in the premises.

Held:
Per Shaik Daud Ismail JCA

[1] There is no room for doubt that room B3 including the cupboard found therein, in which the ganja was found, were accessible not only to all those who resided in the premises but also to anyone who comes to the premises. That being so, the prosecution has failed to prove beyond a reasonable doubt that the appellant had exclusive possession, custody and control of the ganja found in that room.

[1a] In fact, at the close of its case, the prosecution has itself established that the appellant had no exclusive possession of the drug found in room B3. On this score alone, the learned Judge had erred when he invoked the presumption under s. 37(d) of the Act against the appellant.

[1b] At the close of the case for the prosecution, the learned Judge ought not to have called upon the appellant to enter his defence, and ought to have acquitted and discharged him without calling for his defence.

[2] The learned Judge had erred in law in admitting SP12's evidence. All the testimony of SP12 in connection with the appellant are highly prejudicial and ought to be excluded. Inadmissible evidence remain inadmissible whether challenged or not.

[2a] The general rule is that evidence showing the accused had commited any other offence other than those charged, or has a disposition to commit the kind of offence charged, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he is charged. Having admitted the highly prejudicial evidence, it is obvious that this had influenced the learned Judge to hold that the

appellant had exclusive possession, custody or under his control the offending drugs.

[Appeal allowed, conviction quashed, sentence set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR JENAYAH: *Sabitan - Samada disabitkan sewajarnya - Bukti di luar keraguan yang wajar - Milikan eksklusif - Keterangan pendakwaan menunjukkan tertuduh tidak mempunyai milikan eksklusif dadah - Penggunaan s. 37(d) Akta Dadah Berbahaya 1952 - Samada satu salah arahan - Memanggil pembelaan - Samada juga merupakan satu salah arahan - Akta Dadah Berbahaya 1952, s. 39B (1)(a)*

JENAYAH: *Mengedar ganja - Akta Dadah Berbahaya 1952, s. 39b(1)(A) - Milikan eksklusif - Dadah dijumpai dalam bilik yang tidak berkunci yang boleh dimasuki oleh tertuduh dan orang-orang lain - Samada dadah dalam milikan eksklusif tertuduh - Penggunaan s. 37 Akta - Samada satu salah arahan - Samada tertuduh sepatutnya dibebaskan dan dilepaskan*

KETERANGAN: *Penerimaan masuk - Tuduhan mengedar ganja - Bukti tertuduh memberi ganja kepada seorang saksi sebelum penahanan - Samada memudaratkan - Samada tak boleh diterima - Penerimaan masuk - Samada memudaratkan perayu*

Perayu merupakan penyewa utama tingkat atas premis yang dikenali sebagai No. 14A, Jalan Kapas, Pelabuhan Kelang. Premis tersebut, yang mempunyai lima bilik, didiami oleh lima orang termasuk perayu. Fakta menunjukkan bahawa, daripada kelima-lima bilik itu, sebuah (bilik B3) telah tidak didiami oleh sesiapa khususnya dan telah digunakan oleh orang-orang yang mendiami di premis itu, antara lainnya, sebagai tempat menyimpan pakaian lama mereka. Bilik B3 tidak pernah dikunci, dan boleh dimasuk bukan sahaja oleh kelima-lima penyewa itu tetapi juga oleh sesiapa sahaja yang berkunjung ke premis tersebut.

Pada 23 Mei 1990, polis telah menyerbu premis berkenaan dan mendapati daripada bilik B3 1248.02 gram ganja, berikutan mana perayu telah dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar dadah tersebut. Di hadapan Hakim yang bijaksana, keterangan telah dikemukakan bahawa sebelum penyerbuan itu SP12 telah menghisap ganja dalam premis tersebut dan bahawa ganja tersebut telah diberikan oleh perayu. Keterangan ini tidak dicabar oleh perayu, dan atas alasan itu telah diterima-masuk oleh Mahkamah. Berdasarkan fakta, Hakim yang bijaksana juga menganggapkan bahawa adalah wajar untuk menggunakan s. 37(d) Akta, dan

setelah melakukan demikian, telah mensabitkan perayu dan menjatuhkan hukuman mati. Perayu merayu, dan persoalan-persoalan yang berikut telah berbangkit untuk penentuan Mahkamah Rayuan:

(i) samada sabitan menjadi tak sah oleh salah arahan, kerana Hakim perbicaraan yang bijaksana, berdasarkan fakta, seharusnya telah melepaskan dan membebaskan perayu; dan

(ii) samada Hakim perbicaraan salah ketika menerima-masuk ke dalam keterangan testimoni SP12 bahawa beliau telah menghisap ganja yang dibekalkan oleh perayu dalam premis tersebut.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Tidak terdapat apa-apa keraguan bahawa bilik B3 termasuk almari yang terdapat di dalamnya, di mana ganja itu telah ditemui, dapat dimasuki bukan sahaja oleh kesemua orang yang mendiami premis tersebut tetapi juga oleh sesiapa jua yang datang ke situ. Dalam keadaan yang sedemikian, pihak pendakwaan telah gagal membuktikan tanpa sebarang keraguan munasabah, bahawa perayu mempunyai milikan eksklusif, jagaan dan pengawalan ganja yang terdapat dalam bilik itu.

[1a] Malahan, di akhir kes mereka, pihak pendakwaan sendiri telah membuktikan bahawa perayu tidak mempunyai milikan eksklusif akan dadah yang terdapat dalam bilik B3. Berdasarkan perkara ini sahaja, Hakim yang bijaksana telah tersalah pertimbangan apabila beliau menggunakan tanggapan di bawah s. 37(d) Akta tersebut terhadap perayu.

[1b] Di akhir kes pendakwaan, Hakim yang bijaksana tidak seharusnya memanggil perayu untuk membuat pembelaan, dan seharusnya telah membebaskan dan melepaskannya tanpa memanggil beliau membuat pembelaan.

[2] Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang apabila menerima masuk keterangan SP12. Kesemua testimoni SP12 berhubung dengan perayu adalah amat memudaratkan dan seharusnya diketepikan. Keterangan yang tidak boleh diterima akan kekal tidak boleh diterima samada ianya dicabar atau pun tidak.

[2a] Menurut kaedah am keterangan yang menunjukkan tertuduh telah melakukan mana-mana kesalahan yang lain selain daripada yang dituduh, atau mempunyai kecenderungan untuk melakukan jenis kesalahan yang

dituduh, adalah tidak boleh diterima bagi tujuan menunjukkan bahawa beliau telah melakukan atau berkemungkinan telah melakukan kesalahan yang mana beliau telah dituduh. Setelah menerima masuk keterangan yang amat memudaratkan itu, adalah jelas bahawa ianya telah mempengaruhi Hakim yang bijaksana untuk memutuskan bahawa perayu mempunyai milikan eksklusif, jagaan atau di bawah kawalannya dadah yang menyalahi itu.

[Rayuan dibenarkan, sabitan dibatalkan, hukuman diketepikan.]

Cases referred to:
Gooi Loo Seng v. PP [1993] 2 MLJ 137 ***(foll)***
Choo Yoke Choy v. PP [1992] 2 MLJ 632 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), (2)

[Appeal from High Court Malaya, Shah Alam; Criminal Trial No: 47-13-1991]

For the appellant - Kitson Foong & Lim Bee Leong; M/s. Kitson Foong & Assoc.
For the respondent - Stanley C. Augustin

JUDGMENT

Shaik Daud Ismail JCA:

On 10 September 1994, the Shah Alam High Court convicted the appellant on a charge of trafficking in 1284.02g of ganja which offence was alleged to have been committed on 23 May 1990, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (hereinafter referred to as 'the Act') and under s. 39B(2) of the Act sentenced the appellant to death. There is no dispute that the substance seized were in fact ganja as defined in s. 2 of the Act.

The facts of the case are that on 23 May 1990, at about 10.40 p.m. a police party led by Inspector Sia Siew Keng (SP3), presumably on information received, raided premises number 14A Jalan Kapas, Pelabuhan Kelang. The police party conducted a search of the premises, and in one room, marked B3 in the sketch plan, was found two plastic bags containing what was suspected to be ganja. One plastic bag yellow in colour (P22) was found in an unlocked cupboard, and another bag red in colour was found on top of the same cupboard.

At the time of the police raid, there were in all five people in the said premises, three male Malays, namely, the appellant, Amirullah b. Hamzah (SP12) and Mohd. Musa bin Mukri (who had since passed away on 25 January 1991), one male Indian Kumaravelu a/l Nagalingam (SP10) and one female

Malay Intan Zamrud binti Harun (DW2). Also found in the premises was one newborn infant of Intan Zamrud, whose father apparently was Musa b. Mukri, a four-month old infant the child of appellant and one Juliana Kuan (SP11) and another eleven year old boy of Juliana Kuan. All the adults found in the premises, except DW2, were arrested for further investigations.

Earlier to the raid, at about 10.00 p.m. SP3 arrested one Ishak b. Hashim (SP9) at a restaurant in connection with another drug offence.

The evidence led by the prosecution showed that SP9 led SP3 and his police party to the premises. On arrival at the address which was on the upper floor of a double storey terrace house, SP3 faced with a locked grill door, asked SP9 to call out the name Din and soon after a male Malay, later identified to be the late Mohd. Musa, came down and opened the grill door. Immediately upon SP3 identifying himself as the police, the late Mohd. Musa ran upstairs followed by SP3 and his police team. In the living room SP3 found the five adults mentioned earlier.

There were in all five rooms in the premises. SP3 ascertained that the appellant and his girlfriend Juliana Kuan (SP11) occupied room marked B1, the late Mohd. Musa b. Mukri and his girlfriend Intan Zamrud binti Harun (DW2) occupied room marked B2 while room marked B4 was occupied by Kumaravelu a/l Nagalingam (SP10). The room B3, in which the drugs were found, was not occupied by anyone in particular. According to Kumaravelu (SP10), he rented room B4 from the appellant who was the chief tenant of the premises. He confirms the occupancy of the rooms in the premises as ascertained by SP3. According to SP10, room marked B3 was used by appellant as a store room and he himself had used the room. According to the evidence of Ishak b. Harun (SP9), before his arrest, at about 9.30 p.m., he went to the said premises where he met the late Mohd. Musa. According to SP9, Mohd. Musa took him into the room marked B3 which was not locked, and from a cupboard, took out a package and asked him to deliver it to one Wak Alip at the restaurant. At that time, SP9 states that appellant was in the sitting room with the others. Amirullah b. Hamzah (SP12) testified that he used to visit the premises two or three times a week and he confirmed that he himself used to enter room B3 which was never locked and he had seen the late Musa and appellant had also entered the room. He also said that that room was used for "solekan". Juliana Kuan (SP11) also testified that room B3 was used as a store room, and that it was never locked. It was used to keep old clothes and the room and the cupboard found therein were accessible to everyone living in the premises, to keep old clothes, to do ironing and make up. She also testified that a set of baju Melayu found in the cupboard belonged to one Fauzi who used to frequent the premises and who also had access to

room B3 to pray in. Intan Zamrud binti Harun (DW2) was a prosecution witness made available to the defence. She testified that she resided in the premises with the late Mohd. Musa but were not married. She testified that she had used room B3 to iron clothes in and not only she confirmed that all those residing in the premises had access to the room, but also that anyone who visited the premises had access to the room.

From the evidence of these witnesses, it seems to us that there is no room for doubt that the room B3 including the cupboard found therein, in which the ganja was found, were not only accessible to all those who resided in the premises but also accessible to anyone who comes to the premises. Therefore, it seems clear to us that the prosecution has failed to prove beyond a reasonable doubt, that the appellant above had exclusive possession, custody and control of the ganja found in that room. On this score alone, we feel that the learned Judge had erred when he invoked the presumption under s. 37(d) of the Act against the appellant. At the close of the prosecution's case, the prosecution itself has in fact established that the appellant had no exclusive possession of the drug found in room B3, given the fact that the others in the premises, had access to that room. In *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 a far worse situation existed *vis-a-vis* to the place where the drug was found.

In that case the appellant was charged with trafficking 22.469g of heroin. The facts showed that upon detention by the police, the appellant brought the police to the room occupied by him and his girlfriend, where the police recovered from the bottom of a plastic cupboard two packages containing the heroin. The girlfriend testified that she held a set of keys to the room and that she used the room as her own and she shared the same bed as the appellant. The appellant testified that his girlfriend used to bring her friends to gamble in that room. The Supreme Court in allowing the appeal came to the conclusion that not only the appellant's girlfriend had access to the room but also that her friends "could have had access to the room if they so wished". On that evidence Edgar Joseph Jr. SCJ delivering the judgment of the Court at p. 142 held:

> We need hardly add, that even if the appellant had known of the presence of the heroin **in his bedroom**, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well. (The emphasis is ours).

In *Choo Yoke Choy v. PP* [1992] 2 MLJ 632 the facts show that a party of police officers raided a house. There were 10 persons in the house. On searching appellant's room which was occupied by the appellant and his wife, the police recovered a plastic bag lying on the floor in which were found heroin. After the appellant was questioned by the police, they recovered more drugs outside the house. In allowing the appeal the Supreme Court held that with regards to the drugs in the appellant's room, the evidence was not sufficient to establish that the appellant had the drugs in his custody or under his control as there were two people occupying the room.

In the present case, however, the drugs were not found in the appellant's bedroom but in a store room accessible to not less than five adults in the premises and also to others who visited the premises. This was not even a case of others "could have had access to the room if they so wished" but a case of others in fact had access. This too, was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

For the above reasons, we hold that at the close of the prosecution's case, the learned Judge ought not to have called upon the appellant to enter his defence and ought to have acquitted and discharged him without calling for his defence.

Apart from this, the appeal records show that the learned Judge admitted evidence highly prejudicial to the appellant through the testimony of SP12. SP12 was allowed to adduce evidence that he had frequently visited the premises in order to smoke ganja sometimes with the late Mohd. Musa and sometimes with the appellant and that the appellant had smoked ganja in that premises before. The testimony of SP12 that just before the police raided the premises he had smoked ganja in the premises which ganja was allegedly provided by the appellant. The learned Judge admitted all these simply on the ground that there was no challenge of this in cross-examination and that there was no reason for him to reject such evidence. With respect, we hold that the learned Judge erred in law on this issue, as it is trite law that inadmissible evidence remains inadmissible whether challenged or not. We hold that all the testimony of SP12 in connection with the appellant, are highly prejudicial and ought to be excluded. The general rule is that evidence showing the accused had committed any other offence other than those charged, or has a disposition to commit the kind of offence charged, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he is charged. Having admitted and considered the highly prejudicial

evidence, it is obvious that this had influenced the learned Judge to hold that appellant had exclusive possession, custody or under his control the offending drugs.

For the above reasons, we are unanimously of the view that the appellant ought to have been acquitted at the close of the case for the prosecution without his defence being called, and in the light of this finding, we feel, we need not consider the defence. We allowed the appeal, quashed the conviction and set aside the sentence. The appellant is acquitted and discharged.

Reported by WA Sharif